Mariah bte Mohamad (Administratrix of the estate of Wan Salleh bin Wan Ibrahim, deceased) v Abdullah bin Daud (Dr Lim Kok Eng & Anor, Third Parties)

HIGH COURT (KOTA BHARU) — CIVIL SUIT NO 254 OF 1983
ABDUL MALEK J
20 SEPTEMBER 1989

Road Traffic — Accident — Deceased cut across path of defendant — Whether deceased contributorily negligent — Whether deceased died from injuries or negligence of third party — Apportionment of liability

Damages (Personal Injury or Death) — Accident — Death — Quantum of damages — General damages — Special damages

Professions — Medical practitioner — Whether deceased died due to negligence of third party in managing him as a patient — Whether medical conclusions satisfactory

The deceased was injured in a road accident on 31 January 1981 and died on 18 July 1981. At that time, the deceased was earning a monthly salary of $365. The widow testified that she spent $500 for funeral expenses, $300 for the grant of letters of administration and $150 for 15 visits to the hospital. She also claimed that the deceased's bicycle was worth $100. She alleged that after the accident, the deceased was restless all the time and tied for some time lying down while in the hospital and at home. He could not walk on his own nor talk. He could not eat and was fed through tubes and could urinate only through condom drainage. He was finally discharged on 30 June 1981 and she alleged that the doctor had told her mother to treat her husband at home. His condition did not change; in fact he got worse and subsequently died.

According to the defendant, he saw the deceased some 60 ft away. The deceased was cycling along the left side and suddenly crossed in front of his car when he was 30 ft away. He sounded his horn and swerved to the right but could not avoid the accident. Expert evidence was given on behalf of the defendant by a doctor (DW2), who was of the opinion that the deceased should never had been discharged, and a computer axial tomogram scan ('CAT scan') ought to have been done to get further information as regards the blood clot and state of fluids in the brain. Evidence was also given by the medical officer in charge (TPW1) to the effect that the head chart indicated no abnormal signs in the nervous system. There was no manifestation of a blood clot although the possibility was always present. The deceased was then discharged and readmitted. According to TPW1, the cause of death could have been due to head injuries and could have been saved if there was a CAT scan. However, in many other similar cases, no CAT scan was done. The third party (TPW2) gave evidence that he was only involved in the deceased's conservative treatment. He added that there was no purpose in doing the CAT scan as it was discovered that damage to the brain at the time of the accident was permanent. Another witness (TPW3) also gave evidence that the deceased showed no neurological deficit when he was first discharged. On the second admission, TPW3 had intended to do a CAT scan but it was only available in Kuala Lumpur and no appointment could be arranged by 31 May 1981. As such, TPW3 decided to do exploratory burr holes and no evidence of any haemotoma was found. Although he then recommended institutional care, the deceased's relatives preferred to bring him home resulting in the second discharge.

Held, allowing the plaintiff's claim on 40% liability against the defendant and dismissing the action against the third party:

(1) The court accepts the fact that the deceased had cut across the path of the defendant about 30 ft away but is of the view, especially because the defendant had noticed the deceased from a distance 60 ft away, that there was a far enough distance for the defendant to have anticipated the possibility of the deceased cutting across and to have been able to avoid the collision. However, the deceased was more to blame as there would have been no accident if he did not cut across in that manner. Accordingly, liability is apportioned at 60% as against the plaintiff and 40% as against the defendant.

(2) The first third party has been wrongly cited as he was not involved in the active management of the deceased despite his signatures on the records. In fact, he was assisting another doctor. However, based on the evidence which satisfactorily explained the conclusions made by the doctor, no legal inference can be made on the facts as they stand upon a balance of probabilities that the third party was liable in negligence. The doctor had treated the deceased in the same way he had treated other patients in similar conditions.

(3) The court allowed, on a 100% liability:

(a) the sum of $500 claimed for funeral expenses as the plaintiff stated that she had spent this amount, and it was a reasonable and appropriate amount for a Muslim funeral;
(b) the sum of $350 for the letters of administration as this is the usual figure;
(c) the sum of $36 for the medical report, police and sketch plan reports and the RIMV report;
(d) the sum of $100 for the loss of the bicycle although there was no clear evidence as regards the damage but it was a fair amount;
(e) the sum of $150 for transport expenses as the deceased spent some time in hospital;
(f) the sum of $6,000 for loss of expectation of life as agreed by the parties;
(g) the sum of $31,150 for loss of future earnings;
(h) the sum of $15,000 for pain and suffering and loss of amenities since death was not immediate.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 254 of 1983.]

Cases referred to

1 *Teoh Kim Seng* v *Hassan bin Mohamed & Anor* [1987] 2 MLJ 209 (folld)
2 *Thangavelu* v *Chia Kok Bin* [1981] 2 MLJ 277 (folld)
3 *Ho Kiong Chan* v *Patipet* [1966] 1 MLJ 159 (refd)
4 *Chan Peng Fook* v *Kan Pak Lee* [1974] 2 MLJ 197 (refd)
5 *Joginder Kaur & Anor* v *Malayan Banking Ltd & Anor* [1971] 1 MLJ 98 (refd)
6 *Lanphier* v *Phipos* 8 Cart & P 475; 173 ER 581 (refd)
7 *Rich* v *Pierport* 3 F & F 35; 176 ER 16 (refd)
8 *Hunter* v *Hanley* 1955 SC 200 (refd)
9 *Jones* v *Great Western Ry Co* 144 LT 194 (refd)
10 *R* v *Bateman* (1925) 94 LJ KB 791 (refd)
11 *Clark* v *MacLennan & Anor* [1983] 1 All ER 416 (refd)
12 *Bolam* v *Friern Hospital Management Committee* [1957] 1 WLR 582 (refd)

Mahmood Adam for the plaintiff.
Siva Dharma for the defendant.
Daphne Sebastian (*Ms*) and *Kang Hwee Ghee* for the third parties.

Cur Adv Vult

Abdul Malek J: This matter first came up before me on 23 July 1985 but in view of the defendant's application then to issue a third party notice against the third party and subsequently his application for time to serve the said notice, the hearing could only commence on 16 September 1987. On that date, the plaintiff and the defendant gave evidence but the matter had to be adjourned as the defendant's witness could not be present. On 12 December 1987, both the defendant's witness and the second third party's first witness testified but the trial had to be postponed as the first third party was not present and the second third party's second witness was away in India. The matter was then fixed on 21 November 1988 for an application by the third party by way of summons-in-chambers to amend their pleadings to include the limitation clause under the Public Authorities Protection Act 1948, but because of floods, only counsel for the defendant was present, and the summons-in-chambers was also on the next day withdrawn by the third party in view of a Supreme Court decision on the same point that same week. The case was then postponed to 28 March 1989 when the trial finally came to an end.

The plaintiff (PW1) had told the court that she was in confinement when her husband was injured in an accident on 31 January 1981 and did not know how the collision took place. She also did not look after her husband while he was unconscious in hospital for six months before he passed away on 18 July 1981. At the time of the accident, she had five children ranging in age from 9 years to 16 days.

She also gave evidence that her husband had worked at Telecoms with a monthly salary of $365 and that he used to give her $300 a month as he usually ate at home. She explained that $50 was for her husband and $250 for her and the children. PW1 also stated that she spent $500 for funeral expenses and $300 for the grant of letters of administration. She added that her husband's bicycle valued at $100 was totally wrecked and that she had incurred $150 for the 15 hospital visits.

She disputed the cause of death as 'sakit biasa' and insisted that it was due to the accident. She had lodged her police report two years after the accident as she was in confinement at the time of the accident. She further told the court that she had remarried in 1985 to a construction labourer who earned $10 per day and who gave her $150 a month on the average. She is also receiving her deceased husband's pension of $70 per month.

PW1 also testified that her late husband was restless all the time and tied for some time lying down while in hospital and at home. He could not walk on his own and could not talk. He could not eat and was fed through tubes and he could urinate only through condom drainage. He was finally discharged on 30 June 1981 and according to PW1, the doctor had told her mother to treat the plaintiff's husband at home. From the discharge up to his death on 18 July 1981, PW1 said his condition did not change and in fact he was getting worse.

The defendant (DW1) told the court that he was driving from Kota Bharu to Bulatan Wakaf Siku on 31 January 1981 in the lane nearer the left side of the road at 40 km per hour when a cyclist on his left suddenly crossed in front of him. DW1 said he sounded his horn and swerved to the right but could not avoid the accident. The cyclist was flung onto the car bonnet. DW1 also said that before that he had seen the cyclist 60 ft away cycling in a normal manner but had crossed when he was 30 ft away. DW1 further told the court that he had also applied his brakes hard to avoid the collision.

The defendant's witness was Dr N Arumugasamy (DW2) who was formerly Head of Surgery at the Kuala Lumpur General Hospital from 1969 to 1985 after receiving neurosurgery training in the United States from 1964 to 1969. According to DW2, he had perused the case notes of the deceased in November 1987 and had prepared his report dated 13 November 1987. He was of the opinion that the patient should never had been discharged under those conditions and that a computer axial tomogram scan (hereinafter 'CAT scan') ought to have been done to get further information, as regards the blood clot and state of fluids in the brain, to further manage the patient. He said that if that had been done, a more definitive approach could have been taken. DW2 was then the head of Surgery in the Kuala Lumpur General Hospital and he said that all CAT scan cases from all over the country where there were no such facilities were referred to him. The exploratory burr holes which were done, he said, was only exploratory to exclude the possibility of a blood clot.

DW2 added that with the notes he had and without a post-mortem, he could not state with certainty the cause of death. His view was that the patient should not have been discharged on both discharge dates as the notes stated that the patient was irritable, disoriented and drowsy. He agreed, however, that if all investigations had ruled out the presence of structural abnormality responsible for that state, it was all right to discharge the patient provided he had proper nursing care. He felt that the patient should have been transferred to a better centre with better facilities like Kuala Lumpur which was the practice then as one-third or half of over a thousand head injury cases a year in Kuala Lumpur were from outside Kuala Lumpur.

The relevant medical officer in charge of the patient, Dr A Ramachandran (TPW1), gave evidence that the deceased's head chart, which monitors conscious level, pupillary reaction, temperature, respiration, blood pressure and pulse, was steady and that there were no abnormal signs in the nervous system. He had prescribed intramuscular valium to quieten restlessness, common for head injury patients, but had subsequently discontinued

the Manitol drug and had given Nootropil instead to activate the central nervous system.

Between 31 January 1981 and 28 February 1981, TPW1 stated that there were no manifestations of a blood clot but conceded that the possibility was always present. He added that another doctor, Dr Annamalai, was responsible for the deceased's first discharge. He, however, said that he would have done the same thing as there was no deterioration to the condition and that there were signs of improvement. The question of a CAT scan, he said, did not arise as the facilities were not available in Kota Bharu.

TPW1 went on to say that the deceased was readmitted on 25 April 1981. Under cross-examination by plaintiff's counsel, TPW1 stated that the deceased's condition was better on the first discharge and he agreed with the first third party that there was no improvement on the second discharge. As regards the cause of death, TPW1 told the court that it could have been due to the head injuries and that he could have been saved if there was a CAT scan. He explained that the patient was not sent to Kuala Lumpur for a CAT scan as there were many other similar cases where they did not do so. They would have sent if there was no improvement but here he said there was. He also said that there was a note to call Kuala Lumpur as regards the CAT scan but apparently there was no follow-up.

The first third party (TPW2) testified that he was attached to the orthopaedic unit of the General Hospital, Kota Bharu in 1981 and was aware of the deceased's second admission but stated that he was not involved in the active management of treatment of the deceased despite his signatures appearing in the records. This was because, he said, he used to accompany Dr Annamalai, the orthopaedic consultant, on his rounds. He maintained, however, that he was not responsible for the deceased's second discharge on 30 June 1981. TPW2 reiterated that he was only involved in the deceased's conservative treatment, namely, the administration of intravenous drips, physiotherapy and the like. He did not recommend the CAT scan nor follow-up on the note to call Kuala Lumpur for such at p 55 of C. He added that from the time of the second admission to the date of the second discharge the deceased never improved. There was also no purpose in doing the CAT scan as the exploratory burr holes had been done when it was discovered that the damage to the brain at the time of the accident was permanent.

The witness further stated that the deceased was referred to the psychiatric unit for assessments which unit diagnosed it as post traumatic psychosis. To rule that out, TPW2 said the exploratory burr holes were done upon which no lesion or blood clot was found in the brain, that is, no subdural haematoma was found as opposed to an intracerebellar blood clot in the brain.

The third party's last witness, Dr A Annamalai (TPW3), an orthopaedic surgeon since 1975, stated that he had been treating head injuries since 1979. He said that he did not see the deceased on his first admission on 31 January 1981 but only on 3 February 1981. The deceased, he said, was not a case requiring his immediate attention and there were five to ten such admissions daily. TPW3 told the court that he diagnosed the matter as cerebral contusion where recovery was usually within 24 to 48 hours but where damage may last as long as 18 months. The witness further said that there was no evidence of either a subdural, extradural or intracerebral haematoma and no localizing signs to suggest an intracranial compression although the deceased was unconscious initially. TPW3 further gave evidence that from the records, the deceased had become conscious after admission but drowsy and by 3 February 1981, the deceased was showing signs of improvement; on 7 February 1981 he had no fever and was conscious, mildly drowsy and there was no neurological deficit; on 10 February 1981 his condition was the same as on 7 February 1981; on 12 February 1981 he was shouting abusive language and was put on tranquilisers; on 14 February 1981 the tranquilisers were stopped; on 19 February 1981 his condition was the same as on 14 February 1981 and on 7 February 1981; and he was discharged on 28 February 1981 as he was conscious, alert, rational, and his speech normal but disoriented with time and space, and that there was no neurological deficit.

TPW3 also testified that after the deceased's first discharge, he was seen by a Dr Chee on 9 March 1981 where he was conscious and drowsy and there was no mention of localizing signs, and by a Dr Yusof on 23 March 1981 and 20 April 1981 where the deceased could answer questions. Before the deceased's second admission, TPW3 had referred him to a psychiatrist who said that there was post concussional syndrome and wanted to rule out chronic subdural haemotoma. Because of that, the deceased was readmitted on 25 April 1981.

In view of the psychiatrist's findings, TPW3 had intended to do a CAT scan but this was then only available in Kuala Lumpur. An appointment could not be arranged by 31 May 1981 and TPW3 decided to do the exploratory burr holes the result of which no evidence of any haematoma was found. He maintained that there was no change of diagnosis as for the first admission but the deceased was better then than at the time of the two admissions. Although TPW3 wanted to give the deceased institutional care in the Machang District Hospital, the deceased's relatives preferred to bring him home resulting in the deceased's second discharge on 30 June 1981. TPW3 also said that the deceased was seen by Dr Chee on 10 July 1981 where the deceased was able to talk and had no complaints.

Under cross-examination, TPW3 said that despite the note to call Kuala Lumpur for the CAT scan, he did

not know if the minute was acted upon by Dr Yusof. In any case, TPW3 did not agree that a CAT scan would have been more beneficial. In fact, he was of the opinion that it was not necessary. The earlier decision for one, he added, was only on ethical grounds in view of the psychiatrist's conclusions.

I shall first deal with the question of quantum. As regards the special damages claimed by the plaintiff, I would allow the $500 claimed for funeral expenses under item (a) as apart from the plaintiff's evidence that she had spent this amount, it was a reasonable and appropriate amount to spend for a Muslim funeral. I would also grant the prayer of $350 for the letters of administration as this is the usual figure. For item (c), since the agreed bundle of documents (A) only includes the receipts for the medical report ($20), police and sketch plan reports ($6) and the RIMV report ($10) but not for the second police report in the bundle of documents not agreed (B) for $2, the court makes an award of $36 only. Although there is no clear evidence as regards the damage to the bicycle apart from the plaintiff's testimony, I would still allow the $100 claimed as being a fair amount to award for the loss of the bicycle. Considering the fact that the deceased spent some time in hospital, I also awarded the plaintiff $150 claimed under item (e) for her transport expenses to go to the hospital to visit the deceased.

For loss of expectation of life, the award would be $6,000 as this figure has been agreed to by counsel for the plaintiff and the defendant in their submissions, which amount in any case is in line with the present awards under this head in view of the Supreme Court decision in *Teoh Kim Seng* v *Hassan bin Mohamed & Anor*.[1] For loss of dependency, the $250 a month stated by the plaintiff as being the amount given to her by the deceased has not been seriously contested and based on a multiplier of 55 minus 42 and taking away another one-third for contingency (4) resulting in 9, the award would be $21,323.47 based on the annuity tables. However, in view of the reasoning enunciated in *Thangavelu* v *Chia Kok Bin*,[2] I would make an award of $250 times the seven years two months' pretrial period amounting to $21,500 added to $250 with the remaining multiplier of two which comes to $5,580 following the annuity tables and rounded up to the nearest round figure. This gives a total of $27,080. The award for loss of future earnings would be $365 on a multiplier of nine which gives a figure of $31,150 to the nearest. As this is higher than the loss for dependency, I would grant this award of $31,150 for the lost years.

Learned counsel for the plaintiff had also submitted that since death was not immediate, an award should be made for pain and suffering and loss of amenities. I entirely agree with this submission and without any serious contest from the other two counsel, I made an award of $15,000 under this head for the period of 5 months 18 days from the accident to the date of death considering the $20,000 award made in *Thangavelu* v *Chia Kok Bin*,[2] for a period of 11 months and 6 days.

It is now necessary to determine the question of liability. As between the plaintiff and the defendant, the court accepts the fact that the deceased had cut across the path of the defendant about 30 ft away but is of the view, especially because the defendant had noticed the deceased from a distance 60 ft away, that this was a far enough distance for the defendant to have anticipated the possibility of the deceased cutting across and to have been able to avoid the collision. He should therefore be found contributorily liable based on *Ho Kiong Chan* v *Patipet*,[3] *Chan Peng Fook* v *Kan Pak Lee*,[4] and *Joginder Kaur & Anor* v *Malayan Banking Ltd & Anor*.[5] I was, however, of the opinion that the deceased was more to blame as there would have been no accident if he did not cut across in that manner. On the facts adduced, I would apportion liability as against the plaintiff at 60% and as against the defendant at 40%.

Since it is not in dispute that the deceased did not die a natural death, the next question is whether the deceased died as a result of the accident contributed by his own negligence and that of the defendant or whether it was due to the negligence of the third party in managing him as a patient. As for the first third party (TPW2), my opinion is that he had been wrongly cited as it is obvious that he was not involved in the active management of the deceased despite his signatures on the records which happened to be so as he was in fact assisting TPW3. However, he had found no improvement of the deceased on the second admission and up to the second discharge and was of the view that no purpose would be served by doing a CAT scan on the deceased as the exploratory burr holes had showed that the damage was permanent.

TPW1 had categorically given evidence that between the dates of the first admission and discharge on 31 January 1981 and 28 February 1981 respectively, there were no manifestations of a blood clot, and agreed with the decision of TPW3 to discharge the deceased the first time as there was no deterioration, and in fact there had been some improvement. He added that the deceased's head chart was steady and that there were no abnormal signs in the nervous system. TPW3 had told the court that he had not attended immediately to the deceased on admission as it was not necessary and in any case there were five to ten such cases daily. He had diagnosed the deceased as having cerebral contusion where recovery could be as early as 24 to 48 hours or as long as 18 months. He found no evidence of a subdural, extradural or intracerebral haematoma or intracranial compression.

He had subsequently discharged the deceased the first time as he found him to be conscious, alert, rational, normal in speech although disoriented with time and

space and having no neurological deficit. Between his first discharge and second admission, the deceased had attended three follow-up check-ups where he was found to be conscious and was in a position to answer questions. He was also referred to a psychiatrist which diagnosed it as post traumatic psychosis. To rule that out, exploratory burr holes were done where no lesion or blood clot, ie no subdural haematoma, was found in the brain. TPW3 had then suggested to the deceased's relatives that he be given institutional care at the Machang District Hospital but this was refused and so the patient was discharged the second time on 30 June 1981. He had one follow-up check-up on 10 July 1981 where he was able to talk but he died on 18 July 1981.

DW2, who was at the relevant time working at the Kuala Lumpur General Hospital, was of the view that the deceased should have been sent for a CAT scan, which was then not available in Kota Bharu, to get further information as regards the blood clot and state of fluids in the brain, to further manage the patient. A CAT scan, he added, would have enabled a more definitive approach. He, however, agreed that if all investigations had ruled out the presence of a structural abnormality responsible for the state of the deceased, it was all right to discharge the deceased provided he had proper nursing care. On this point, it must be noted that TPW3 did suggest to the deceased's relatives to place him at the Machang District Hospital but this had been rejected.

In *Lanphier* v *Phipos*,[6] the court had ruled that:

> Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, competent degree of skill, and you will say whether, in this case, the injury was occasioned by the want of such skill in the defendant.

In *Rich* v *Pierpont*,[7] Erle CJ had succinctly stated that:

> A medical man was certainly not answerable merely because some other practitioner might possibly have shown greater skill and knowledge; but he was bound to have that degree of skill which could not be defined, but which, in the opinion of the jury was a competent degree of skill and knowledge.

These cases were heard in 1838 and 1862 respectively. In 1925, in the case of *Hunter* v *Hanley*,[8] which was an appeal by a medical practitioner against his conviction for manslaughter arising out of the death of a patient, the court's view was:

> But where the conduct of a doctor, or indeed of any pofessional man, is concerned, the circumstances are not so precise and clear cut as in the normal case of negligence. In the realm of diagnosis and treatment, there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge; establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care ....

In *Jones* v *Great Western Ry Co*,[9] Lord Macmillan in a dissenting judgment pronounced that:

> The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference of causation and may vary in degree between practical certainty and reasonable probability.

In *R* v *Bateman*[10] the court opined that:

> A doctor's duty towards his patient is that he has to exercise a fair and reasonable standard of care and skill, ie the skill of an ordinarily competent medical practitioner.

Learned counsel for the defendant had also referred to the judgment in *Hunter* v *Hanley*,[8] which stated:

> To establish liability by a doctor where deviation from normal practice is alleged, three facts require to be established. First of all, it must be proved that there is a usual and normal practice; secondly, it must be proved that the defender has not adopted the practice and thirdly (and this is of crucial importance), it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have undertaken if he had been acting with ordinary care.

and to *Clark* v *MacLennan & Anor*[11] where the court had expressed the following:

> Where, however, there is but one orthodox course of treatment and he chooses to depart from that, his position is different. It is not enough for him to say as to his decision simply that it was based on his clinical judgment. One has to inquire whether he took all proper factors into account which he knew or should have known, and whether his departure from the orthodox course can be justified on the basis of these factors.

In *Bolam* v *Friern Hospital Management Committee*,[12] McNair J had declared that:

> The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest skills, it is well established that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular act.

On these considerations, I was of the opinion that as far as the first third party was concerned, he had been wrongly cited. TPW3 should have been the first third party. Be that as it may, since the death of the deceased was 18 days after his second discharge, having been hospitalized for about two months, and after a proper regular check-up about eight days earlier where the deceased was able to talk, because no post-mortem had been conducted, and

also because TPW3 had satisfactorily explained his conclusions, the court held that no legal inference can be made on the facts as they stand upon a balance of probabilities that the third party was liable in negligence. Even DW2 could not categorically state that TPW3 had been wrong in his diagnosis. He had only opined that a CAT scan in Kuala Lumpur would have enabled the authority to manage the deceased better.

At the most, therefore, DW2's testimony remains a matter of opinion. There is no cogent evidence that TPW3 had departed from the approved practice in treating the deceased. TPW3 had been attending to the deceased throughout and had diagnosed the matter as a cerebral contusion where the recovery could take as long as 18 months. He had found it fit to discharge the deceased on both occasions being of the opinion that, in view of the progress of the deceased, nothing else could be done. He had even recommended institutional care for the deceased after the second discharge. Both the discharges had been followed with follow-up check-ups where the deceased was able to talk. In short, TPW3 had treated the deceased in the same way he had treated other patients in similar condition, which according to him were not that rare considering the five to ten such admissions daily. In the event, he had not sent the deceased for a CAT scan which he said was neither necessary nor beneficial.

In the circumstances, I would find the plaintiff 60% liable, the defendant 40% liable and the third party not liable for negligence. In the event, the court awards the plaintiff, on 100% liability, special damages of $1,136 with interest at 4% from the date of the accident to the date of judgment and general damages totalling $52,150 made up of $6,000 for loss of expectation of life, $31,150 for the lost years and $15,000 for pain and suffering and loss of amenities, with interest at 8%, except for the future loss, from the date of service of the writ to the date of judgment and costs. The defendant is to pay the costs of the third party. As usual, all costs are to be taxed accordingly.

Order accordingly.

Solicitors: *Mahmood Adam, Wan Ismail & Co; Matthew Thomas & Co.*

Reported by *Yap Shao Sin*

Sungei Way Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors

HIGH COURT (SIBU) — SUIT NO 33 OF 1985
CHONG SIEW FAI J
6 SEPTEMBER 1989

Civil Procedure — Consent judgment — Submission to judgment — Setting aside of judgment — Fraud, negligence and mutual mistake alleged

Civil Procedure — Execution — Stay — Action for order to set aside judgment — Special circumstances

A consent judgment was entered against the defendants in this action but subsequently they commenced Suit No 64 of 1986 against the plaintiff in which they sought an order to set aside the judgment. The defendants, except for the first defendant, applied for a stay of execution of the judgment pending the outcome of the trial of Suit No 64 of 1986 or until further order. The grounds of the application were that the judgment was obtained by (i) negligence, fraud or alternatively by negligent or fraudulent inducement on the part of the plaintiff, their servants or agents; and (ii) by mutual mistake on the part of the plaintiff and the defendants in the action.

It was contended for the defendants/applicants that they expected the first defendant company to pay the judgment sum and that entry of the judgment would be a mere formality which would enable the first defendant company to settle the claim. It was also contended that it was only when the plaintiff commenced execution proceedings against the defendants/applicants that it became clear to the defendants/applicants that submission to judgment involved themselves being personally liable for the judgment debt. It was alleged that it was the practice of the plaintiff to take judgment in such a manner and that the plaintiff agreed that 'the judgment will automatically lapse upon the updating of the account'. It was also contended for the defendants/applicants that there was a distinction between submitting to judgment and allowing judgment to be entered in terms as in this action. The defendants/applicants also alleged that they 'were supposedly to be guarantors' in respect of a lease agreement between the plaintiffs and a company named Grand Lumber Sdn Bhd but that the first defendants' name was substituted without the consent of the defendants/applicants.

Held, dismissing the application:

(1) It is, of course, true as a matter of law that in the compromise of an action, the forms and methods of compromise or settlement may, among others be: (a) an agreement to enter judgment by consent; and (b) an agreement for the defendant to submit to judgment. In the instant case, the parties had not only agreed to submit to judgment but also to have the consent judgment entered.

(2) The defendants/applicants, on the materials available, were clearly guarantors for the lease agreements entered into between the plaintiffs and the first defendants.

(3) A stay of execution of a judgment for payment of money will not ordinarily be granted simply on the ground that the defendants/applicants have brought an action to set aside the judgment, at any rate not in the absence of special circumstances rendering it inexpedient to enforce the judgment, though the bringing of the action is of course a factor to be considered together with other relevant facts and circumstances that are properly placed before the court.